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PEMBINAAN LCL SDN BHD

v.

SK STYROFOAM (M) SDN BHD

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COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ZULKEFLI MAKINUDIN JCA
ZAINUN ALI JCA
[CIVIL APPEAL NO: W-02-421-2003]

C

13 MARCH 2007

ARBITRATION: *Award - Setting aside - Appeal against decision of High Court to set aside arbitrator's award - Whether arbitrator committed errors of law - Function of court in an application under Arbitration Act*

D

1952 - Whether exercise of appellate jurisdiction or function by court unwarranted - Whether there was an irregularity causing a miscarriage of justice that was apparent on face of award

CIVIL PROCEDURE: *Jurisdiction - High Court - Appeal against*

E

decision of High Court to set aside arbitrator's award - Whether arbitrator committed errors of law - Function of court in an application under Arbitration Act 1952 - Whether exercise of appellate jurisdiction or function by court unwarranted - Whether there was an irregularity causing a miscarriage of justice that was apparent on face of award

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In this appeal concerning the court's function in an application made under the Arbitration Act 1952 ('Act') to challenge an arbitrator's award, the High Court had set aside one part of the arbitrator's award, varied another part and remitted yet another to the arbitrator. The appellant complained that the basis on which

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the High Court acted amounted to the exercise of appellate jurisdiction and was, therefore, outside the set parameters of arbitral jurisdiction. The respondent argued that the learned judge kept entirely within the circumscribed limits of his jurisdiction or, if he did not, then, his decision was correct on the facts and no

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miscarriage had been occasioned. Initially, the respondent had appointed the appellant as the main contractor to construct an office and a factory, and the parties had entered into a formal agreement in the form prescribed by the Architects Association of Malaysia. By April 1998, the appellant had had difficulties with the

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respondent, and matters came to a head when the appellant, on 24 April 1998, wrote to the respondent raising three matters on which it said that it was entitled to temporarily stop work. By a

letter of the same date, the appellant informed the architect that it would not be attending the site meeting scheduled for 2.30pm that day; work at the site was then suspended.

On the very next day, the architect, acting under cl. 25 of the contract, issued a default notice to the appellant. In it he held the appellant in breach of contract and warned that if work were not recommenced, another contractor would be appointed. Clause 25 required such a notice to be served by registered post or recorded delivery but the notice was instead sent by fax on 25 April 1998 and then delivered by hand two days later. The appellant did not recommence work and, after 26 days had passed, the respondent terminated the contract. In the meantime, on 1 May 1998, the architect issued his certificate of non-completion. The parties subsequently submitted their differences to an arbitrator, who held that the respondent's termination of the contract was invalid and that, consequently, the respondent had acted in breach of contract. In arriving at his conclusion, the arbitrator made a number of findings that were of critical importance to this case, they being: (i) that time was not of the essence of the contract; (ii) that the certificate of non-completion was invalid because the architect had not properly assessed the appellant's request for extension of time; and (iii) that the notice of termination of contract offended the terms of the contract and the common law and was, hence, invalid. The learned judge who heard the respondent's application to set aside the award held that the arbitrator had committed errors of law and found for the respondent. Hence, the present appeal by the appellant.

Held (allowing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) There was no error of law made by the arbitrator in finding that time was not of the essence of the contract. Having changed the very nature of the work involved, the parties had re-written the original contract in a material particular and could no longer insist on performance in accordance with the time limit fixed by the original contract. In such circumstances, if the promisee wishes to reinstate time to be of the essence, he or she must give reasonable notice to the promisor of such intention (Contracts Act 1950, s. 56(3) refd). (para 6)

(2) In respect of the finding by the arbitrator that the certificate of non-completion was invalid, the architect could not know the precise completion time; thus, he could not express an opinion that the works ought reasonably to have been completed on a certain date. Since time was not of the essence of the contract, the architect was in no position to determine when the actual completion date was unless he had given reasonable notice of the respondent's intention to reinstate the time clause. Accordingly, the arbitrator committed no error of law in this part of his award. (para 7)

(3) It is the unanimous view of all the relevant authorities that the High Court in exercising its statutory jurisdiction under the Act does not enjoy appellate jurisdiction. In the present instance, from the language employed in the learned judge's judgment, it may be readily gathered that he was treating the application before him as though it were an appeal. The points on which the learned judge faulted the arbitrator for having committed an error of law were at best appellate errors, that is to say, errors of the kind that usually lead a Court of Appeal to interfere with a decision at first instance. They were not arbitral errors. No doubt, the arbitrator held that the notice of termination was contractually flawed, and in doing so, he took a strict constructionist approach. But the arbitrator did not stop there, and he went on to hold that the termination was bad at common law. This was a fact sensitive finding and applying the case of *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* to the facts of this case, the arbitrator's finding that the respondent was in breach of contract because its notice of termination was bad at common law rendered the award beyond attack in proceedings under the Act. Therefore, the learned judge should have refused the respondent's motion to set aside the award and ought not to have made the orders that he did. (paras 14, 15, 16, 17, 18 & 19)

(4) It had been submitted that an error of law on the face of an award occurs, *inter alia*, when an arbitrator has proceeded illegally, for instance, by deciding on evidence which is not legally admissible. With respect, this was not a correct submission. Ordinary courts are not seised of jurisdiction to remit or set aside the award of an arbitrator on the ground that wrong inferences of fact had been drawn or that

inadmissible evidence had been let in and acted upon. To do so would amount to the unwarranted exercise of an appellate function over private arbitrations which, of course, courts do not have. (paras 20 & 22) A

(5) It had also been strenuously argued that the award disclosed an error of law on its face because the arbitrator did not adopt the business commonsense approach when interpreting the service provision housed in cl. 25. It was the respondent's argument that all the cases which adopted a strict approach were wrongly decided because they did not have regard to the decision in *Hill v. London Borough of Camden*, and it was also averred for the respondent that the arbitrator treated the decision in *Hill (supra)* as supporting the strict constructionist approach when that decision was for quite the opposite view. Hence, the arbitrator had committed an error of law. In this case, it was unnecessary to go into the question whether the strict constructionist approach is to be abandoned in view of *Hill (supra)* because the arbitrator here had not only struck down the termination notice on procedural grounds but had also found the termination to be illegal at common law. (para 23) B C D E

(6) Even if it were accepted that the arbitrator misconstrued *Hill (supra)* as supporting the strict constructionist approach, it mattered not a jot because he had held the notice bad on other grounds as well. Mark that this was a case where the respondent was insisting on obligations being performed in accordance with a contract, the terms of which had been substantially thrown overboard by the change in the structure system from steel to reinforced concrete. It was crystal clear that the respondent had acted in breach of contract by issuing the termination notice based on a time frame that was no longer operative. The final conclusion of the arbitrator was therefore supportable on the alternative ground even if he was wrong in his earlier reasoning. The arbitrator's award thus could not be set aside even if the arbitrator had committed an error of law as it was an error that did not vitiate the whole award. Put differently, this was not a case where there had been occasioned some irregularity causing a miscarriage of justice that was apparent on the face of the award. (para 24) F G H I

[Orders of High Court set aside; arbitrator's award restored.]

A ***Bahasa Malaysia*** *translation of headnotes*

Dalam rayuan di sini yang menyentuh fungsi mahkamah dalam mengendalikan permohonan di bawah Akta Timbangtara 1952 ('Akta') untuk mencabar award penimbangtara, Mahkamah Tinggi
B telah mengenepikan sebahagian award, mengubah sebahagian yang lain dan mengembalikan sebahagian lagi kepada penimbangtara. Perayu mendakwa bahawa keputusan Mahkamah Tinggi adalah menyerupai pelaksanaan bidangkuasa rayuan, dan adalah terkeluar dari batasan bidangkuasa timbangtara. Responden berhujah
C bahawa yang arif hakim masih berada dalam batas bidangkuasanya, dan jika tidakpun, keputusannya adalah betul di sisi fakta dan tidak mencetuskan apa-apa salah laksana keadilan. Responden pada mulanya melantik perayu sebagai kontraktor utamanya bagi membina sebuah pejabat dan kilang, dan pihak-pihak telah
D memeterai satu perjanjian formal seperti yang ditetapkan oleh Persatuan Arkitek Malaysia. Pada bulan April 1988, salah faham tercetus di antara pihak-pihak, dan pertikaian sampai kepada kemuncaknya apabila pada 24 April 1988 perayu menulis kepada responden dan membangkitkan tiga persoalan yang dikatakannya
E telah memberinya alasan untuk memberhentikan kerja buat sementara. Melalui satu surat yang bertarikh sama, perayu memberitahu arkitek bahawa ia tidak akan menghadiri mesyuarat tapak yang dijadualkan pada jam 2.30 ptg hari tersebut; kerja-kerja ditapak kemudian telah digantung sementara.

F Pada keesokan harinya, dengan bertindak di bawah kl. 25 kontrak, arkitek mengeluarkan notis pelanggaran kepada perayu. Notis tersebut menyatakan bahawa perayu telah melakukan kemungkiran, dan sekaligus memberi amaran bahawa jika kerja tidak disambung
G semula maka kontraktor lain akan dilantik. Klausa 25 mengkehendaki supaya notis hendaklah diserah melalui pos berdaftar ataupun dengan penghantaran berekod. Notis, namun begitu, telah dihantar melalui fax pada 25 April 1998 dan diserah ke tangan dua hari kemudian. Perayu tidak menyambung kerja dan
H 26 hari kemudian responden menamatkan kontraknya dengan perayu. Dalam pada itu, pada 1 Mei 1988, arkitek mengeluarkan sijil gagal menyiapkan kerjanya. Pihak-pihak kemudian merujuk pertikaian kepada penimbangtara, di mana diputuskan bahawa penamatan kontrak oleh responden adalah tak sah dan bahawa
I responden telah bertindak secara yang melanggar kontrak. Dalam mencapai keputusannya, penimbangtara telah membuat beberapa dapatan yang amat penting kepada kes di sini, iaitu: (i) bahawa masa bukan merupakan intipati kontrak; (ii) bahawa sijil gagal

menyiapkan kerja tak sah disebabkan arkitek tidak memberi pertimbangan wajar kepada permohonan perayu untuk lanjutan masa; dan (iii) bahawa notis penamatan kontrak adalah tak sah kerana melanggar terma-terma kontrak serta undang-undang common. Yang arif hakim yang mendengar permohonan responden untuk mengenepikan award berpendapat bahawa penimbangtara telah melakukan satu kesilapan undang-undang dan dengan itu memutuskan perkara dengan memihak kepada responden. Maka perayu telah merayu.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Tiada kesilapan undang-undang dilakukan oleh penimbangtara apabila mendapati bahawa masa bukan intipati kontrak. Setelah mengubah sifat kontrak berkenaan, pihak-pihak telah menulis semula secara material kontrak asal dan dengan itu tidak boleh lagi menuntut pelaksanaan berdasarkan kepada had waktu yang ditetapkan oleh kontrak asal. Dalam keadaan tersebut, jika promisee berhasrat untuk menjadikan masa sebagai intipati kontrak semula, maka ia perlu memberi notis munasabah mengenai hasratnya kepada promisor (Akta Kontrak 1950, s. 56(3) dirujuk).

(2) Berhubung dapatan penimbangtara bahawa sijil gagal menyiapkan kerja adalah tak sah, arkitek jelas tidak mengetahui masa penyiapan yang sebenar; oleh itu beliau tidak boleh memberi pendapat bahawa kerja-kerja harus disiapkan pada tarikh tertentu. Oleh kerana masa bukan intipati kontrak, arkitek tidak berupaya menentukan bilakan kerja harus disiapkan, kecuali jika beliau telah memberi notis munasabah mengenai hasrat responden untuk menggerakkan semula fasal mengenai masa. Ianya mengikut bahawa penimbangtara tidak melakukan apa-apa kesilapan undang-undang di bahagian awardnya yang berkenaan.

(3) Menjadi pandangan semua autoriti bahawa Mahkamah Tinggi, dalam melaksanakan bidangkuasa statutori di bawah Akta, tidak memiliki bidangkuasa rayuan. Dalam kes semasa, dari perbahasaan yang digunakan dalam penghakiman yang arif hakim, boleh dirumuskan bahawa beliau menganggap permohonan di hadapan beliau adalah suatu rayuan. Kesalahan-kesalahan yang dikatakan dilakukan oleh penimbangtara dan yang dikata menjadi kesilapan undang-undang di pihaknya, paling

tinggi pun, hanyalah kesilapan rayuan (appellate errors), iaitu, jenis kesilapan yang menjadi asas kepada Mahkamah Rayuan untuk campurtangan terhadap keputusan di peringkat pertama. Ia bukanlah kesilapan timbangtara. Tidak dinafikan bahawa penimbangtara telah memutuskan bahawa notis penamatan adalah cacat pada sisi kontrak, berdasarkan kepada pendekatan pentafsiran yang ketat. Penimbangtara, namun begitu, tidak berhenti di situ sahaja. Beliau menyatakan selanjutnya bahawa penamatan juga adalah tak sah di sisi undang-undang common. Ini adalah dapatan yang sensitif kepada fakta, dan dengan menggunapakai kes *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* kepada fakta-fakta di sini, dapatan penimbangtara bahawa responden telah memungkiri kontrak disebabkan notis penamatan tak sah di sisi undang-undang common tersebut menjadikan awardnya itu tidak boleh dicabar di dalam prosiding di bawah Akta. Oleh yang demikian, yang arif hakim sepatutnya menolak usul responden untuk mengenepikan award dan tidak seharusnya membuat perintah sepertimana yang dibuatnya di sini.

(4) Telah dihujahkan bahawa kesilapan undang-undang di permukaan rekod berlaku, antara lain, apabila seorang penimbangtara bertindak secara tak sah, umpamanya dengan membuat keputusan berdasarkan kepada keterangan yang tidak boleh diterima-masuk. Dengan hormat, ini bukanlah satu hujah yang betul. Mahkamah-mahkamah biasa tidak mempunyai bidangkuasa untuk mengembalikan semula atau mengenepikan award seorang penimbangtara atas alasan bahawa telah berlaku inferens salah terhadap fakta atau bahawa keterangan yang tidak boleh diterima-masuk telah diterima-masuk dan diberikan pertimbangan. Melakukan demikian samalah seperti melaksanakan tugas rayuan terhadap timbangtara persendirian yang mana ianya tidak dibenarkan dan di mana mahkamah tidak mempunyai bidangkuasa untuk berbuat demikian.

(5) Juga dihujahkan dengan panjang lebar bahawa terdapat kesilapan undang-undang di permukaan award disebabkan penimbangtara gagal mengambil pendekatan berasaskan akalbudi bisnes apabila mentafsir peruntukan uruskhidmat yang terdapat pada kl. 25. Menurut responden, semua kes-kes yang mengambil pendekatan ketat adalah diputuskan secara salah kerana membelakangkan keputusan di dalam *Hill v. London*

Borough of Camden. Dihujahkan seterusnya bahawa penimbangtara telah menganggap kes *Hill (supra)* sebagai menyokong pendekatan pentafsiran ketat sedangkan keputusan kes tersebut menjurus kepada keadaan sebaliknya. Oleh itu, penimbangtara telah melakukan satu kesilapan undang-undang. Dalam kes ini, adalah tidak perlu untuk memutuskan sama ada pendekatan pentafsiran ketat harus ditinggalkan disebabkan oleh kes *Hill (supra)* kerana penimbangtara di sini bukan sahaja telah membatalkan notis penamatan atas alasan prosedur semata-mata, tetapi telah juga mendapati bahawa penamatan adalah tak sah di sisi undang-undang common.

(6) Jikapun ianya diterima bahawa penimbangtara telah tersalah tafsir kes *Hill (supra)* sebagai telah menyokong pendekatan pentafsiran ketat, itu tidak memberi apa-apa kesan kerana beliau juga memutuskan notis adalah tak sah atas alasan-alasan lain. Harus diingat bahawa ini adalah kes di mana responden menuntut pelaksanaan obligasi berdasarkan terma kontrak, sedangkan terma kontrak telah jauh dilontar keluar oleh perubahan pada struktur sistem dari struktur besi keluli kepada struktur konkrit dipadatkan. Adalah jelas bahawa responden telah bertindak secara yang melanggar kontrak apabila mengeluarkan notis penamatan berdasarkan kepada tempoh masa yang tidak lagi beroperasi. Konklusi muktamad penimbangantara adalah dengan itu disokong oleh alasan alternatif walaupun beliau mungkin tersilap dalam alasan awalnya. Award penimbangtara, dengan itu, tidak boleh diketepikan jikapun beliau telah melakukan satu kesilapan undang-undang, disebabkan ia bukanlah kesilapan yang mencacatkan keseluruhan award. Dengan lain perkataan, ini bukanlah kes di mana ketidakteraturan telah berlaku sehingga membawa kepada salah laksana keadilan di permukaan rekod.

[Perintah-perintah Mahkamah Tinggi diketepikan; award penimbangtara dikekalkan.]

Case(s) referred to:

Damodar Valley Corpn v. CESC Ltd AIR [2005] Cal 67 ***(refd)***

Fajar Menyensing Sdn Bhd v. Angsana Sdn Bhd [1998] 6 MLJ 80 ***(refd)***

Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor [1999] 2 CLJ 788 CA ***(refd)***

Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd [2004] 1 CLJ 743 FC ***(refd)***

A *Jeuro Development Sdn Bhd v. Teo Teck Huat (M) Sdn Bhd [1998] 3 CLJ Supp 366 HC* ***(refd)***
Mt. Amir Begam v. Syed Badruddin Husain AIR [1914] PC 105 ***(refd)***
Municipal Committee, Jullundur City v. Shri Romesh Saggi AIR [1970] P&H 137 ***(refd)***
B *Puri Construction Pvt Ltd v. Union of India AIR [1989] SC 777* ***(refd)***
Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority [1971] 2 MLJ 210 ***(foll)***
Union of India v. ML Dalmiya and Co Ltd AIR [1977] Cal 266 ***(refd)***
Union of India v. Rallia Ram AIR [1963] SC 1685 ***(refd)***
Upper Ganges Valley Electricity Supply Co Ltd v. Uttar Pradesh Electricity
C *Board AIR [1973] SC 683* ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 56(3)

For the appellant - Lim Chong Fong (Lau Weng Ann with him); M/s WA
D *Lau & Partners*
For the respondents - Sivarasa Rasiah (Ser Chong Ing with him); M/s Ser & Co

[Appeal from High Court, Kuala Lumpur; Originating Motions No: R2-25-41-2002]
E

Reported by Suresh Nathan

JUDGMENT

F

Gopal Sri Ram JCA:

[1] This appeal does not raise any novel point of law. It has to do with the court's function in an application made under the
G Arbitration Act 1952 to challenge an arbitrator's award. That, of course, is a settled question. And I will, later in this judgment, deal with it at some length. In the case at hand, the High Court set aside one part of the arbitrator's award, varied another part and remitted yet another to the arbitrator. The appellant
H complains that the basis on which the High Court acted amounts to the exercise of appellate jurisdiction and therefore outside the set parameters of arbitral jurisdiction. The respondent argues that the learned judge kept entirely within the circumscribed limits of his jurisdiction. Or, if he did not, then, his decision is correct on
I the facts and no miscarriage has been occasioned. It is now important to set out the facts in a nutshell. Here they are.

[2] On 15 February 1997, the respondent appointed the appellant as the main contractor to construct an office and a factory. The parties entered into a formal agreement on 8 April 1998. That agreement was in the PAM form. That is to say, the contract was in the form prescribed by the Architects Association of Malaysia. Clause 25 of the contract reads as follows:

> 25. (1) If the Contractor shall make default in any one or more of the following respects, that is to say:
>
> (a) If he without reasonable cause wholly suspends the carrying out of the Works before completion thereof, or
>
> (b) If he fails to proceed regularly and diligently with the Works, or
>
> (c) If he refuses or persistently neglects to comply with a written notice from the Architect requiring him to remove defective work or improper materials or goods and by such refusal or neglect the Works are materially affected, or
>
> (d) If he fails to comply with the provisions of clause 17 of these Conditions
>
> then the Architect may give to him a notice by registered post or recorded delivery specifying the default, and if the Contractor either shall continue such default for fourteen days after receipt of such notice or shall at any time thereafter repeat such default whether previously repeated or not) then the Employer without prejudice to any other rights or remedies may within ten days after such continuance or repetition by notice by registered post or recorded delivery forthwith determine the Employment of the Contractor under this Contract provided that such notice shall not to be given unreasonably or vexatiously.

[3] By April 1998, the appellant had had difficulties with the respondent. Matters appear to have come to a head because, on 24 April 1998, the appellant wrote to the respondent raising three matters based on which it said that it was entitled to temporarily stop work. By a letter of the same date the appellant informed the architect that it would not be attending the site meeting scheduled for 2.30pm that day. Work at the site was then suspended. On the very next day, that is to say, on 25 April 1998, the architect, acting under cl. 25 of the contract issued to the appellant a default notice. In it he held the appellant in breach of contract and warned that if work was not re-commenced, another contractor would be appointed.

[4] Now, as you can see, cl. 25 requires such a notice to be served by registered post or recorded delivery. This did not happen. Instead, the notice was sent by fax on 25 April and then delivered by hand two days later, on 27 April 1998. The appellant did not re-commence work, and, after 26 days had passed, the respondent by its solicitors' letter of 21 May 1998 terminated the contract. In the meantime, on 1 May 1998, the architect issued his certificate of non-completion. Later, the parties submitted their differences to an arbitrator who, in his award dated 15 March 2002, found for the appellant. Essentially, he held that the respondent's termination of the contract was invalid and that consequently the respondent had acted in breach of contract. He then went on to carry out the rather tedious exercise of dealing with each head of complaint with regard to the quality of work and materials before arriving at the final figure that the respondent had to pay to the appellant as compensation.

[5] In arriving at his conclusion that the respondent had acted in breach of contract, the arbitrator made a number of findings which are of critical importance in this case. First, he found that time was not the essence of the contract. This was because:

> ... the structure system was changed from steel to reinforced concrete (RC) construction. Each system entails vastly different construction materials, procedures, and techniques. A change from one method to another would mean, and necessitate a change in the contact, especially with regard to cost and time. Such a change is too substantial and fundamental to the contract to justify treating is simply as variation and to grant EOT (extension of time).

[6] I can find no error of law here. It is really a matter of common sense. If I ask my cobbler to make me a pair of canvas shoes within a week and he agrees, I cannot possibly hold him to the week's time limit if I were to alter my order to a pair of patent leather shoes. Having changed the very nature of the work involved, the parties have re-written the original contract in a material particular and may no longer insist on performance in accordance with the time limit fixed by the original contract. In such circumstances, if the promisee wishes to re-instate time to be of the essence, he or she must give reasonable notice to the promisor of such intention. See, Contracts Act 1950, s. 56(3).

[7] Next, he found that the certificate of non-completion (CNC) was invalid because the architect had not properly assessed the appellant's request for extension of time. The architect could not therefore know the precise completion time. How then could he, asked the arbitrator, "express an opinion that the works ought reasonably to have been completed on a certain date?" This point really flows from the first. Since time was not of the essence of the contract, the architect was in no position to determine when the actual completion date was unless he had given reasonable notice of the respondent's intention to reinstate the time clause. Accordingly, the arbitrator committed no error of law in this part of his award.

[8] Thirdly, the arbitrator held that the notice of termination of the contract offended the terms of the contract and the common law. He said that it was therefore invalid. It was at this target that learned counsel for the respondent concentrated his attack upon when supporting the judgment under appeal. The arbitrator dealt with this point in his award as follows:

> I find that the determination by the respondent fails because it has not met the provisions and requirement of clause 25. I am persuaded to this view because I agree with the Claimant's arguments in its closing submission on this point.
>
> The Respondent in its Further Reply has submitted on 'business common sense' as the principle to adopt as against 'professional business sense'. However, in this case I am guided by and adopt the opinion given in Hudson paragraph 12-2004 on Contractual Determination 'exact and meticulous compliance by the determining party with any formal or procedural requirements laid down in the termination clause for example, as to notices or time limits will usually be required if a contractual termination is to be successful, whereas the formal requirements for a successful common law determination are much more based and require little more than a clear and unequivocal indication of his intentions by the determining party.' (Ref: also *Hill v. London Borough of Camden*.)

[9] The learned judge who heard the respondent's application to set aside the award accepted the respondent's criticism of it. He held that the arbitrator had committed errors of law. Here are some passages in his judgment that reveal the basis on which he acted. First, the point about cl. 25. This is what he said:

> As stated above, the arbitrator did not identify the provisions and requirements of clause 25 which were not met (see p 301 of encl). In the second paragraph under this head, the arbitrator says that he is not minded to adopt the 'business common sense approach'. He said, 'however, in this case, I am guided by and adopt the opinion given in Hudson para 12-004 on Contractual Determination 'exact and meticulous compliance by the determining authority with any formal or procedural requirements laid down in the termination clause, for example, as to notices or time limits will usually be required if a contractual termination is to be successful whereas the formal requirements for a successful common law determination are much more, based and require little more than a clear and unequivocal indication of his intentions by the determining party. These observations indicate that he has agreed with the main argument made by the respondent (at p 202, paras 63 and 64, and also p 245 of encl 2) that the default notice of 25 April 1998 was defective because it was not sent by registered post as required under cl 25 of the contract. This was notwithstanding the fact it is undisputed that the notice was delivered by hand. Clause 25 is set out at pp 16–17 of exhibits to encl 2 in 'TYS-2'. I am of the opinion that in so finding, the arbitrator misdirected himself in law and construed clause 25 on principles of law not countenanced by the law. He applied principles not permitted or recognized by the law as now developed and set out in a line of cases. This is most clearly demonstrated in the case that the arbitrator himself cited in this part of the Award – *Hill v. London Borough of Camden* [1980] 18 BLR 35. I think the arbitrator's approach in law directly contradicted the decision in *Hill*.

[10] Having spent a considerable amount of time on cl. 25, the learned judge turned his attention to arbitrator's award on the merits of the case and said this:

> In Sundra Rajoo on the *Malaysian Standard Form of Building Contract* (The PAM 1998 Form) (2nd Ed 1999), on the aspect of failure to remove defective work as a default under cl 25(1)(iii), the writer also contemplates that such a default may allow determination under common law *albeit* he does indicate that it may not be easy to justify. Nowhere in the authorities or in the textbook commentaries does one find the position taken by the arbitrator that failure to remove defective work is not a permissible reason for a common law determination. In misconstruing the law in this way, the arbitrator has therefore put himself in the position that he refuses to entertain the rival contentions of each party on this question, refuses to analyze the evidence and make a finding as to whether as a matter of fact and law, that the contention of

the applicant that the respondent failed to remove defective work to the extent it became a sufficiently fundamental breach of contract was made out or not. He has clearly misconducted the proceedings in this sense and has failed to discharge his duty as an arbitrator ie to deal with and decide the question posed to him according to the law.

The arbitrator also observed that 'failure to proceed regularly and diligently with the works is not proven or previously mentioned. The arbitrator then went on to set out the relevant wording in cl 25(1)(a). He appeared to recognize correctly that the contents of cl 25 had relevance for deciding whether a sufficiently fundamental breach had been committed. He then set out the fact of the letter from the respondent contractor to the applicant employer dated 24 April 1998 confirming the fact of 'temporary stop work'. Next he said, 'I now examine the consequences of "temporary stop work" to see what harm, if any, and to what extent it has caused to the respondent' (applicant herein). I think he posed an erroneous question to himself. He then sets out some evidence (see p 302 at the top). He then says as follows in terms of his reasoning:

> Although these scenario *(sic)* are merely speculative, the consideration of what might have been can help us to answer what actually happened. The crucial question now is what harm to the contract or to the employer did this 'temporary stop work' cause? I find the answer to be the possible or potential delay in the completion of the project. How much of a delay? Depending on the manner and speed with which the unresolved matters *(sic)* are handled it would be one week or one month or no delay in the final analysis.

Here again, I think that he has misconstrued the law and has posed the same wrong question again to himself.

What are the undisputed facts as accepted by the arbitrator himself? First, that the respondent stopped work from 24 April 1998 right up to the determination of the contract on 21 May 1998, a period of 26 days. The arbitrator had also held (see p 83 of encl 2) that the respondent had made an offer for reasonable completion of the contract by 30 March 1998. The arbitrator also accepts from his rendering of the facts that there was a default notice dated 25 April 1998 from the architect warning of termination but of course does not accept its validity pursuant to cl 25. It is also undisputed that there was another notice on 5 May 1998 (after 12 days of continued stoppage of work) again warning of intent to determine if the stoppage continued. It is trite that stoppage of work has no question of

'degrees' of stoppage. One has either stopped work or one is doing some work. The words of clause 25(1)(a) of the contract spelling out the default of 'without reasonable cause wholly suspends the carrying out of the works before completion hereof' clearly show the kind of event that both parties have in contemplation as sufficiently serious to validate determination of the contract just by being carried on for 14 days. The arbitrator correctly accepts the contents of this phrase as relevant to the question of the common law determination. The question now arises – is a contractor who 'temporary stop(s) work' doing the equivalent of 'wholly suspends work'? It cannot be otherwise. As Mr Sundra Rajoo points out, 'Suspension does not imply that the contractor must have left the site but merely that no work is being carried out'. The respondent has submitted before the arbitrator that they only temporarily stopped work therefore they did not wholly suspend work. Does this mean that they have to say that they are permanently stopping work before it can be regarded as wholly suspending work? I think putting the question this way exposes the complete lack of merit in their position. We all know what permanently stopping work means. In the same way it is eminently clear what temporary stopping of work is. The proper questions in law that the arbitrator should have addressed to himself is therefore:

> On the facts of the case, had the Respondent wholly suspended work? If so, was it done because of physical impossibility and hindrance? Bearing in mind the time periods in the contemplation of the parties in cl 25 for continuation of a default that then permitted determination, did this suspension of the work carry on for a time that made it a sufficiently fundamental breach?

The arbitrator never asked these questions. By putting the question as he has done ie by asking to examine the consequences to see what harm, if any, and to what extent the 'temporary stop work' has done, the arbitrator has, perhaps without being quite aware of it, actually recognized a right on the part of the contractor to suspend work. What he is effectively saying is that a contractor has a right in common law to suspend work so long as the damage is not sufficiently serious to become a fundamental breach. I think that such a recognition of such right goes against all known principles of construction law. The law on suspension is conveniently and clearly set out at para 4-223 of Hudson at pp 623-624. I adopt the entire paragraph here. The passage sets out the law as described in the case of *Canterbury Pipe Lines v. Christchurch Drainage* [1979] 16 BLR 76, a decision of the New Zealand Court of Appeal which says, *inter alia*, as follows (see p 90 of the judgment):

> The Mersey Steel decision goes far to explain the apparent absence in English building contract law of any recognition of a common law right to suspend work for wrongful withholding of a progress certificate or payment, as distinct from a right to rescind for a breach going to the root of the contract. ... Apart from suing for interim payments, or requiring arbitration where that is provided for, the remedy – and apparently the only remedy – which the contractor is recognised as having at common law is rescission of a sufficiently serious breach has occurred. If he chooses not to rescind, his own obligations continue. He is bound to go on with the work. All the available English and Commonwealth textbooks on building contracts state the law consistently with this view.

On the same page, the court also indicates that the limited category of circumstances where a party may be exonerated from performance is when his performance is stopped by physical impossibility or hindrance. The arbitrator had never at any time addressed the question to himself as to whether the respondent was justified in stopping work because of a physical impossibility to do the work or a hindrance. The case of *Lubenham Fidelities & Investment Co Ltd v. South Pembrokeshire District Council & Wigley Fox Partnership* 33 BLR 39, an English Court of Appeal case confirms this legal position. At home, we have the High Court decision of *Kah Seng Construction Sdn Bhd v. Selsin Development Sdn Bhd* [1997] 1 CLJ 448 which adopts and follows Lubenham and the observations on this issue in Hudson's at para 4-223, where it is stated that a contractor's response to actual or alleged breaches of contract by the owners by suspending or deliberately going slow are extremely perilous.

On the facts of the case here I am talking about a suspension and not a 'going slow' situation. Low Hop Bing J said categorically (see p 458 of the judgement) that,

> There is no intermediate right in a building contract to suspend works. If the contractor insists on the continued performance of the contract, ie he affirms the contract, he must himself continue to perform his primary obligations under the contract ie continue performing the contract works. That is why suspension of the works by the contract, ie not continuing with his primary obligations, becomes itself a repudiatory breach by the contractor.

> I come to the conclusion that based on the principles of construction law set out above, it is clear that the arbitrator had asked himself the wrong questions and in doing so committed fundamental errors of law on the face of the record. I am of the view that the correct question that ought to have been posted and answered by the arbitrator, ie 'On the facts of the case, had the respondent wholly suspended work? If so, was it done because of physical impossibility or a hindrance to doing work? Bearing in mind the time periods in the contemplation of the parties in cl 25 for continuation of a default that then permitted determination, did this suspension of work carry on for a time that made it a sufficiently fundamental breach?' Can the undisputed facts be answered here? Work was stopped for 26 days. The respondent has not shown any evidence of a physical impossibility or hindrance to justify their suspension. The contract itself contemplated that the employer could determine the contract for a suspension of work without reasonable cause that continued for just 14 days after a warning. I think such a conduct therefore clearly was a breach that was sufficiently fundamental to justify the determination of the contract in common law. The determination of the contract by the applicant was valid in both contract and in common law and therefore the determination by the arbitrator that the determination failed is hereby set aside …

[11] Now before I state my views on the approach adopted by the learned judge to the application before him I consider it essential to advert to the principles that govern an application of the kind that the learned judge dealt with in this case. For that purpose, I need go no further than three authorities. First, judgment of Raja Azlan Shah J (as His Highness then was) in *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [1971] 2 MLJ 210 which is an authority that has been repeatedly quoted from and applied. Here are the relevant passages:

> The key question before the arbitrator was whether the plaintiffs were justified in abandoning the contract before completion. In order to decide this question the arbitrator had to consider from the evidence before him whether the 5 specific allegations enumerated above had been proved. Those were findings of fact. From those findings of fact a question of law became material. The present case bears no resemblance to the case where a specific question of law is referred to the arbitrator. It is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him. The wealth of authorities make a

clear distinction between these two classes of cases and they decide that in the former case the court can interfere if and when any error appears on the face of the award but in the latter case no such interference is possible upon the ground that the decision upon the question of law is an erroneous one. Instances of the former are afforded by *Absalom Ltd v. Great Western (London) Garden Village Society Ltd* [1933] AC 592, *British Westinghouse Electric & Manufacturing Co Ltd v. Underground Railways Co of London Ltd* [1912] AC 673 *Hodgkinson v. Fernie 3 CB* (NS) 189; 140 ER 712, and *Attorney-General for Manitoba v. Kelly and others* [1922] 1 AC 268, 281 PC., *Government of Kelantan v. Duff Development Co Ltd* [1923] AC 395, 411 and *In re King and Duveen* [1913] 2 KB 32 are instances of the latter.

In the present case I have on consideration come to the conclusion that no question of law was referred. What was submitted to the arbitrator was a question of law which incidentally, and indeed necessarily, arose in applying ascertained facts. The reference involved both composite questions of law and fact. The court can therefore review the award if and when there is error apparent on the face of the award.

…

Let me state here that this is not a re-hearing. My sole purpose is to determine whether there is error of law on the face of the award. With regard to the first point, I am not satisfied that the arbitrator had drawn wrong inferences of fact from the evidence. Even if he did, that by itself is not sufficient as a ground to warrant setting aside the award. It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been "misapprehended and misunderstood" (see *In re Great Western Railway Co And HM's Postmaster-General* [1903] 19 TLR 636).

…

In the law of arbitration misconduct is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated. In my judgment the

A plaintiffs' complaint is sustainable only if the failure to do so had occasioned some irregularity causing a miscarriage of justice that is apparent on the face of the award. The arbitrator in the present case had carefully analysed and appraised the material and relevant evidence as he saw fit and came to a conclusion of law.

B **[12]** The second authority is *Union of India v. Rallia Ram* AIR [1963] SC 1685 where Shah J, when delivering the judgment of the Indian Supreme Court said:

> An award being a decision of an arbitrator whether a lawyer or a
> C layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenged on the ground that it is erroneous. In order to make arbitration effective and the awards enforceable, machinery is devised for lending the assistance of the ordinary Courts. The Court is also entrusted with power to modify or correct the award on the
> D ground of imperfect form or clerical errors, or decision on questions not referred, which are severable from those referred. The Court has also power to remit the award when it has left some matters, referred undetermined, or when the award is indefinite, or where the objection to the legality of the award is
> E apparent on the face of the award. The Court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or wilful deception. But the Court cannot interfere with the award if otherwise proper on the ground that the decision appears to it to be erroneous. The award of the arbitrator is
> F ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the Civil Courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the
> G decision. Wrong or right the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievance in the manner provided by the arbitration agreement.

[13] Third, and last, in *Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd* [2004] 1 CLJ 743, Siti Norma FCJ said:

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> The law regarding the effect of an arbitrator's award is well settled in that the award is final, binding and conclusive and can only be challenged in exceptional circumstances. As such, if an arbitrator had erred by drawing wrong inferences of fact from the
> I evidence before him, be it oral or documentary, that in itself is not sufficient to warrant the setting aside of his award.

[14] It is the unanimous view of all the authorities that the High Court in exercising its statutory jurisdiction under the Arbitration Act 1952 does not enjoy appellate jurisdiction. See, for example, *Puri Construction Pvt. Ltd. v. Union of India* AIR [1989] SC 777, where it was held that:

> a court while examining the objections taken to an award filed by an arbitrator is not required to examine the correctness of the claim on merits. The court cannot sit in appeal over the views of the arbitrator by re-examining and re-assessing the materials.

[15] I have read and re-read the judgment under appeal. From the language employed in the learned judge's judgment it may be readily gathered that he was treating the application before him as though it were an appeal. Here is an example of the words he used to criticise the arbitrator:

> Nowhere in the authorities or in the textbook commentaries does one find the position taken by the arbitrator that failure to remove defective work is not a permissible reason for a common law determination. In misconstruing the law in this way, the arbitrator has therefore put himself in the position that *he refuses to entertain the rival contentions of each party on this question, refuses to analyze the evidence and make a finding as to whether as a matter of fact and law, that the contention of the applicant that the respondent failed to remove defective work to the extent it became a sufficiently fundamental breach of contract was made out or not.* He has clearly misconducted the proceedings in this sense and has failed to discharge his duty as an arbitrator ie to deal with and decide the question posed to him according to the law. (emphasis added.)

[16] The points on which the learned judge faulted the arbitrator for having committed an error of law are at best – although I do not say that they amount to – appellate errors, that is to say, errors of the kind that usually lead a Court of Appeal to interfere with a decision at first instance. They are not arbitral errors as explained in the authorities already cited. *Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd* is an example of an arbitral error. There, the Federal Court set aside the award because the arbitrator:

> was more concerned with the issue as to whether the respondent had complied with the procedure of serving the notice of determination as laid down in the contract. He did not direct his mind to the proviso as to whether the notice had been issued unreasonably or vexatiously. He had not subjected himself to the

A crucial question as to the respondent's conduct in sending the notice and in so doing had, on principles of construction, erroneously construed the provisions of cl 26(1)(a).

[17] But that is not the case here. Quite the opposite. No doubt, the arbitrator held the notice of termination to be contractually B flawed. In doing so, he took a strict constructionist approach. And there are many authorities which support such a view. See, for example, *Fajar Menyensing Sdn Bhd v. Angsana Sdn Bhd* [1998] 6 MLJ 80. This is because –

C a forfeiture clause in a building contract will be strictly construed to see whether the operative event has occurred or not. See, *Central Provident Fund v. Ho Bock Kee* [1981] 2 MLJ 162, per Wee Chong Jin CJ.

D **[18]** But the arbitrator did not stop there. He went on and held, as I have already said, that the termination was bad at common law. Here is how he put it:

In this case I find that the potential or possibility of delay in completion of the project to be not of a nature serious enough to E constitute a fundamental breach going to the root of the contract. I thereof find the Respondent's determination under common law to be invalid.

[19] This is a fact sensitive finding. Applying *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [1971] F 2 MLJ 210 to the facts of this case, I am convinced that the arbitrator's finding that the respondent was in breach of contract because its notice of termination was bad at common law rendered the award beyond attack in proceedings under the Act. I am therefore respectfully unable to agree with the learned judge. In G my judgment he should have refused the respondent's motion to set aside the award. He ought not to have made the orders he did. This should really be the end of this matter. But there are two further points made by learned counsel for the respondent that must be now addressed.

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[20] The first point is this. It has been submitted that an error of law on the face of an award occurs, *inter alia*, when – to quote counsel – an arbitrator has proceeded illegally for instance by deciding on evidence which is not legally admissible. With respect, I this is not a correct submission. In *Jeuro Development Sdn Bhd v. Teo Teck Huat (M) Sdn Bhd* [1998] 3 CLJ Supp 366, the court held that:

> The Evidence Act 1950 is therefore not intended to apply to proceedings before an arbitrator (see *Municipal Corp of Delhi v. Jagan Nath Ashok Kumar* [1987] 4 SCC 497; *Hazi Ebrahim Kassam Cochinwalla v. Northern India Oil Industries* AIR [1951] Cal 230). Thus, an arbitrator is not bound by the strict rules of evidence, and it is not a valid objection to the proceedings if he has departed from some technical rule of the Evidence Act 1950 (see *Suppu v. Govindachgaryar* [1887] 11 Mad 85; *Howard v. Wilson* 4 Cal 231).

[21] In *Municipal Committee, Jullundur City v. Shri Romesh Saggi* AIR [1970] P&H 137 the court held that "what is sought to be excluded from the purview of the Evidence Act by referring to 'proceedings before an arbitrator' are proceedings to which the provisions of Arbitration Act 10 of 1940 apply. The object is that the arbitrators cannot be tied down to the strict rules of evidence."

[22] Based on these authorities, I stand by what I said in *Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor* [1999] 2 CLJ 788. And this is what I said:

> At this juncture there is one other case which I think I ought to mention. It was not cited by either side. But I came across it while consulting the authorities upon the subject. It is a case that, on a first reading, caused me some difficulty. It is *Ganda Edible Oils Sdn Bhd v. Transgrain BV* [1988] 1 MLJ 428. Being a decision of the Supreme Court, it has binding effect. There, Syed Agil Barakbah SCJ said (at p 431):
>
> > The questions that should have arisen before the judge were: (1) whether the arbitrator made wrong inferences of fact from the evidence including the four telexes which were incorporated in the award; and (2) whether the arbitrator had erroneously construed the two sections.
> >
> > In the first place, we are satisfied that the arbitrator had considered all the relevant evidence and had not made wrong inferences of fact. As regards the second point, we are also satisfied after careful consideration that the arbitrator has construed the two sections correctly in the light of the facts and surrounding circumstances of the case. We also bear in mind that even if we could come to a different conclusion on the matter, we fail to see in the award that the arbitrator has proceeded illegally either by deciding on inadmissible evidence or applying the wrong principles of construction which the law does not recognize.

> Putting aside for a moment the reference in the foregoing passage to the erroneous construction of the statute in question, which may well be regarded either as an error of law on the face of the award or as misconduct, the Supreme Court speaking through Syed Agil Barakbah SCJ appears at first blush to recognize an ability in a court to intervene on the ground that an arbitrator had made wrong inferences of fact or had considered inadmissible evidence. On the authorities that I have had the advantage of consulting, such a wide jurisdiction does not appear to exist. However, on a more careful reading of the case it is clear that the learned judge was merely adverting to the arguments made before the Supreme Court in that case and repelling a suggestion by counsel that the arbitrator there had drawn erroneous factual inferences or had considered inadmissible evidence. In my view, the *Ganda Edible Oils* case is not, and should not be read, as authority for the proposition that the ordinary courts are seised of jurisdiction to remit or set aside the award of an arbitrator on the ground that wrong inferences of fact had been drawn or that inadmissible evidence had been let in and acted upon. To do so would amount, in my respectful view, to the unwarranted exercise of an appellate function over private arbitrations which, of course, courts do not have.

[23] The second point is this. It has been strenuously argued that the award discloses an error of law on its face because the arbitrator did not adopt the business commonsense approach when interpreting the service provision housed in cl. 25. It is the respondent's argument that all the cases which adopted a strict approach were wrongly decided because they did not have regard to the decision in *Hill v. London Borough of Camden*. It is also argued for the respondent that the arbitrator treated the decision in *Hill* as supporting the strict constructionist approach when that decision is for quite the opposite view. Hence, the arbitrator therefore committed an error of law. Speaking for myself, I find it unnecessary to go into the question whether the strict constructionist approach is to be abandoned in view of *Hill*. It simply does not matter because of the facts of the present case. Here, the arbitrator not only struck down the termination notice on procedural grounds, he also found the termination to be illegal at common law.

[24] Accept for a moment that the arbitrator misconstrued *Hill* as supporting the strict constructionist approach. Yet it matters not a jot. Because, he has held the notice bad on other grounds as well. Mark that this is a case where the respondent was insisting

on obligations being performed in accordance with a contract the terms of which had been substantially thrown overboard by the change in the structure system from steel to reinforced concrete. It is crystal clear that the respondent had acted in breach of contract by issuing the termination notice based on a time frame that was no longer operative. The final conclusion of the arbitrator is therefore supportable on the alternative ground even if he was wrong in his earlier reason. The arbitrator's award cannot therefore be set aside even if the arbitrator had committed an error of law as it is an error that does not vitiate the whole award. See, *Mt. Amir Begam v. Syed Badruddin Husain* AIR [1914] PC 105; *Upper Ganges Valley Electricity Supply Co. Ltd. v. Uttar Pradesh Electricity Board* AIR [1973] SC 683; *Union of India v. M. L. Dalmiya and Co. Ltd.* AIR [1977] Cal 266; *Damodar Valley Corpn v. CESC Ltd.* AIR [2005] Cal 67. Put differently, this is not a case where there has been occasioned some irregularity causing a miscarriage of justice that is apparent on the face of the award.

[25] For the reasons already given, I would allow this appeal, set aside the orders of the High Court and restore the arbitrator's award. The respondent must pay the costs of this appeal and those incurred in the court below. The deposit shall be refunded to the appellant.

[26] My learned brother Zulkefli bin Ahmad Makinudin, JCA and my learned sister Zainun bt. Ali, JCA have seen this judgment in draft and have expressed their agreement with it.